IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10750 of 1998

with

SPECIAL CIVIL APPLICATION No 11179 of 1998

and
CIVIL APPLICATION NO. 3329 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DY EXEUTIVE ENGINEER

Versus

HASMUKH M JASANI

Appearance:

1. Special Civil Application No. 10750 of 1998
MS SEJAL K MANDAVIA for Petitioner
MR RV SAMPAT for Respondent No. 1

2. Special Civil ApplicationNo 11179 of 1998
MR RV SAMPAT for Petitioner
MS SEJAL K MANDAVIA for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 02/09/1999

C.A.V. JUDGEMENT

1. The above two Special Civil Applications and the connected Civil Application are proposed to be disposed of by a common judgment and order.

2. Brief facts giving rise to the above metters are as under :

The prayer in Special Civil Application No.10750 of 1998 is for quashing and setting aside the Award dated 15.9.1998 delivered by the Labour Court, Jamnagar, whereas the prayer in the connected Special Civil Application No.11179 of 1998 is for maintaining the Award aforesaid in so far as it directs reinstatement of the employee, but the prayer is that the said Award be modified to the extent it has denied backwages to the employee. The prayer in the Civil Application is under Section 17(B) of the Industrial Disputes Act (for short "the Act") for direction to the employer to deposit all wages due from 18.12.1988 and for payment thereof to the employee.

3. Hasmukh N. Jasani, respondent in one petition and petitioner in other petition was appointed on a short term project by the Deputy Executive Engineer, Okha Project, Gujarat Maritime Board, as work-charge Additional Assistant Engineer. He was paid basic salary of Rs.1400/- p.m. He was issued initial appointment order for three months from 1.5.1991. He was, however, terminated from service on 1.5.1992 inspite of the fact that after expiry of fixed term he continuously worked for more than 240 days, he was not given any notice or any compensation in lieu of notice. According to the employee the order of termination was illegal and violative of Section 25(F) of the Act. Notice was given for reinstatement, but with no effect, hence industrial dispute was raised. Reference was made by the appropriate Government on 8.12.1992 whereupon the Labour Court of Jamnagar adjudicated the reference and rendered the award directing that the employer should reinstate the employee in service to his original post without backwages. The employer is aggrieved from this Award in so far as it directs reinstatement of the employee where the employee is aggrieved from a portion of Award refusing to grant any backwages.

4. The stand of the employer was that the employee was appointed for a fixed term of three months on a temporary project as Overseer and on expiry of fixed term

he was terminated inasmuch as he was appointed purely on temporary basis and the provision of Section 2(oo)(bb) of the Act is applcable and it was not necessary for the employer to pay any compensation to the employee. It was also pleaded that the employee was gainfully employed elsewhere and as such no backwages could be granted.

5. The fate of Special Civil Application No.11179 of 1998 and Civil Application No.3329 of 1999 is dependent upon the fate of the Special Civil Application No.10750 of 1998. In case the order for reinstatement is quashed as prayed in this Special Civil Application then no question arises for directing the employer to deposit any amount under Section 17(B) of the Act nor any cause being survived for direction to pay any backwages to the employee.

6. The main controversy in these cases is whether the respondent in Special Civil Application No.10750 of 1998 was appointed for a fixed term on temporary post and temporary work and his appointment stood terminated on the expiry of the fixed term and whether the petitioner in case of such appointment was obliged, under the provisions of the Act, to pay any compensation before retrenchment and whether Section 25(F) of the Act was violated by the petitioner.

7. There has been serious controversy between the parties about nature of appointment of the respondent in the instant case. According to the petitioner the respondent was appointed for a fixed term of three months whereas according to the respondent his appointment was not for a fixed term rather his appointment was extended beyond three months after the initial appointment and the services were terminated on 1.5.1992 illegally. The material on record was referred by the two sides. The material consist of oral as well as documentary evidence. However, difficulty arises in such matters in finding out the real nature of appointment. It is, therefore, necessary to lay down certain guidelines for determining the nature of appointment where the employer alleges that the appointment was for a fixed period or fixed term. The following guidelines may successfully be laid down in this direction :

i) The nature of appointment, whether for a fixed period or otherwise is primarily determined on the basis of the contents of appointment letter;

ii) Where there is no such letter of appointment it

can be determined from other documentary evidence if any produced by the parties;

iii) If no documentary evidence is available or has been produced assistance of oral evidenceon record can be taken for determining the real nature of appointment;

iv) Admission of the employee in such matters will also be a material evidence for determining the nature of appointment.

v) The nature of appointment, namely, whether on a permanent post or on work of permanent nature will also render some clue in determining the nature of appointment;

vi) If the appointment is on a project for a fixed term this will also render assistance in coming to the conclusion about real nature of appointment;

vii) The real intention of the employer is also a relevant factor to be taken into consideration. Instances are not rare where no appointment letter is issued for casual labourers. In such cases real intention of the employer is certainly a material factor in determining the nature of appointment;

viii) Acceptance of terms of appointment by the employee or the workman will also render assistance in determining the nature of appointment;

ix) When after expiry of initial period of appointment extension is granted whether orally or through fresh appointment letters then such appointment letters or oral orders will also have material bearing in determining the nature of appointment;

x) The nature of work, namely, permanent or temporary or project type of work, will also give some indication as to what was the real nature of appointment;

xi) The applicability of rules of appointment for regular employees of the department, if made applicable to project work, employees will also render some assistance in determining the nature

of appointment.

8. With the above guidelines let us see what is the oral and documentary evidence on record in this case.

9. Annexure : C in Writ petition No.10750 of 1998 is letter of appointment dated 22.4.1991 through which the respondent was appointed for a period of three months from 1.5.1991 to 31.7.1991 in the pay scale of Rs.1400 2300 plus usual admissible allowances. It is clearly mentioned in this letter of appointment that on the expiry of said period of three months his services will be considered to have discontinued automatically and he will not make any further claim for further appointment. This condition in the letter of appointment speaks clearly that after completion of period of three months there will be automatic discontinuation of work and no further order for termination or discontinuing the services of the respondent would be needed. There was further condition that the respondent, after expiry of aforesaid period of three months, will not claim further appointment. It was also mentioned in the appointment letter that the services of the respondent are also liable to be terminated at any time without any notice even before expiry of the above period of three months. It was therefore a special contract of employment for a period of three months initially and this employment could be terminated even before expiry of three months and that too without giving any notice and after expiry of period of three months the appointment was to come to an end automatically without any further order. It is therefore obvious from the appointment letter that it was a case of appointment for a fixed term.

10. Learned Counsel for the respondent however argued that the respondent was continued in service even after 31.7.1991 and was actually dismissed on 1.5.1992, hence it cannot be said to be a case of fixed term appointment. In order to appreciate this contention the documents and oral evidence have to be considered in the light of the guidelines laid down in the foregoing portion of this Judgment.

11. If the appointment letter is clear and unambiguous it can be held on the strength of Annexure : C that the appointment was for a fixed period of three months. It is further clear from the evidence on record that this was not a regular appointment against a regular or a permanent post. On the other hand, it was appointment on a project, which was not likely to

continue beyond 18 months and the appointment was as charge Additional Assistant Engineer (C) at Okha Port for the work of restoration of Sayaji Pier at Okha Port. Thus, the appointment was for a project which was to continue only for a short period and it was not the appointment on permanent work or a permanent post. No doubt subsequently oral extention was given from time to time upto 30.4.1992. It is admitted that after Annexure : C no fresh appointment letter was issued. Letter dated 17.7.1991, however, shows that since the work of the Project could not be completed within three months extention was sought from 1.8.1991 to 31.10.1991 especially for the post of respondent. In anticipation of extention which was sought on 17.7.1991 it seems that the respondent was continued beyond 31.7.1991. Similar proposal for extention from 1.11.1991 to 31.1.1992 was sought through letter dated 23.12.1991 and the last extention was sought through letter dated 6.1.1992 for a period between 1.2.1992 to 30.4.1992. Thereafter no extention was sought or granted. Consequently after expiry of extended period of three months from time to time the respondent could not be engaged on the post. The aforesaid proposals, therefore, indicate that concession was granted to the respondent to continue on the job, but that concession was again limited for three months after expiry of the initial period of three months contained in the letter of appointment. Thus, if no subsequent appointment letter was issued it cannot be said that the appointment was not for a fixed period.

12. Learned Counsel for the respondent has referred the Certificate dated 12.5.1992 issued from Deputy Executive Engineer, Okha Port and has contended that this Certificate shows that the respondent worked from 1.5.1991 to 30.4.1992 as Civil Superivisor. In the first place this certificate is in the nature of testimonial certifying that the respondent was obedient, sincere and hard-worker. The Deputy Executive Engineer whished him success in future. Mention of work from 1.5.1991 to 30.4.1992 will not make any change in the situation because the work during this period by the respondent is admitted to the petitioner, but the petitioner has clarified and proved that the appointment was for a period of three months and it was extended at intervals for a period not exceeding three months and it came to an end on 30.4.1992. Consequently this certificate is no evidence to determine the nature of initial appointment or continued appointment. Reference was also made to the statement of Bhupendra Kanji Mankwana, employee of the petitioner, but this statement also does not show that the respondent was appointed on a permanent post for a

period extending three months initially.

13. As against this, as pointed out earlier admission of the respondent will be the best evidence unless it is proved to be mistaken or erroneous. Admission is always considered to be the best evidence against its maker unless it is proved to be mistaken or erroneous. The maker of admission is free to explain that he made certain admissions erroneously or mistakenly. No such explanation has been offered by the respondent. In Para : 4 of the Award it is mentioned that the respondent in his cross examination stated that he was applying for the service every three months and the work of Sayaji Pier was likely to continue upto 18 months. These two admissions are categorical and unambiguous. There is no explanation by the maker, namely, the respondent that these admissions were mistaken. If he admitted that he was applying for service every three months it is the best evidence to prove that his appointment was always for a period of three months, namely, for fixed term, and not regular appointment exceeding three months. It is further clear from this admission that the project was likely to continue upto 18 months and in this anticipation approval for continuation of the respondent after three months was sought by the petitioner. This admission will therefore further indicate that the respondent was engaged on a project work and not on a permanent post or on work of a permanent nature. If in this background the total period of the respondent exceeded 240 days it cannot be said that he was entitled to the protection of Section 25-F of the Act.

14. The Supreme Court in two cases in M. Venugopal v/s. Divisional Manager, Life Insurance Corporation of India, reported in (1994) 2 SCC 323 and State of Rajasthan and others v/s. Rameshwarlal Gehlot, reported in (1996) 1 SCC 595 has laid down in clear terms that once the appointment is for a fixed period Section 25-F does not apply as it is covered by clause (bb) of Section 2(oo) of the Act. It has further laid down that in cases of such appointment for a fixed period if the order of termination is passed the provisions of Section 25-F are not attracted hence neither relief of fresh appointment nor that of reinstatement could be granted. Of course, if according to the Apex Court, it is found that the order of termination was malafide or passed in colourable exercise of powers such order of termination can be struck down. In view of these two cases of the Apex Court there remains little scope for consideration of the cases on the point decided by the Punjab & Haryana High Court or the Rajasthan High Court cited by the learned

Counsel for the respondent.

15. Section 2(oo) of the Act defines retrenchment which means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include ...(bb) termination of the service of the workman as a result of the non-renewal of its contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf concerned therein. Consequently Section 2(oo)(bb) of the Act is attracted in the instant case.

16. There is nothing on record to show that the order of termination was malafide or it was passed in colourable exercise of powers conferred on the authority of the petitioner who passed it. If it is so then the Apex Court's verdict in State of Rajasthan v/s. Rameshwarlal Gehlot and M.Venugopal v/s. Divisional Manager, LIC (Supra) is fully applicable to the facts of the case before me.

17. From what has been discussed above it is clear that the respondent was appointed for a fixed period for which there is oral as well as documentary evidence and also admission of the respondent. Moreover intention of the employer was to employee the respondent for a fixed period and the employee accepted the appointment on such terms and conditions as contained in the initial letter of appointment. Extention thereafter was also sought on the said terms and conditions. The departmental rules for regular appointments were not made applicable to the appointment of the respondent. The nature of work being purely temporary and for a fixed period, the appointment of the respondent automatically came to an end after expiry of period of appointment and extended period of appointment which was also for a fixed period. In these circumstances if the respondent was not continued after 30.4.1992 it cannot be termed as retrenchment nor the provisions of Section 25(F) of the Act can be made applicable hence no compensation was required to be paid by the petitioner to the respondent.

18. A passing reference of the cases cited by the learned Counsel for the respondent is desirable though these cases do not directly help the respondent and cannot go over the Apex Court's verdict in the two cases referred above.

19. The case of Uptron India Ltd. v/s. Shammi Bhan

and another, reported in 1998 (2) SLR 544 is distinguishable on facts. In this case the respondent was a permanent employee. He was dismissed from service in terms of Clause : 17(g) of Standing Orders of the concern for overstayal on leave. The Apex Court held that the services of a permanent employee cannot be abruptly or arbitrarily terminated. In the case before me the respondent was not a permanent employee rather he was appointed for a fixed period.

20. The case of Simla Devi v/s. Presiding Officer, reported in 1997 (7) SLR 74 is likewise distinguishable on facts. In this case the petitioner worked for 240 days in 12 months. The plea that the petitioner worked for a specific period was not accepted for want of evidence that the petitioner was engaged for doing the prescribed job and her services came to an end on completion of that job. It was on this factheld that the Award of the Labour Court was erroneous and refusal to reinstatement was quashed and reinstatement ordered in favour of the petitioner. In the case before me there is specific evidence that the appointment was for a fixed period, for a fixed purpose, namely, for completion of project of repair of Sayaji Pier on Okha Port.

21. The case of a State Insurance and Provident Fund Department v/s. Rameshwar Prasad and another, reported in 1994 (5) SLR 344 is also disctiguishable on facts. In this case the appointment of the workman was for a period of three months, but after expiry of three months no order extending the term of appointment was issued. The termination after having worked for 240 days was considered to be retrenchment. The distinguishing feature in the case before me is that the initial appointment was extended, orally at intervals for three months till 30.4.1992 after getting sanction periodically for a period not extending three months. It was not a case where no order extending the appointment was issued.

22. Moreover this can not prevail over the Apex Court's verdict in State of Rajasthan v/s. Rameshwar Gehlot (supra). In that case the facts were that the respondent was appointed for a period of three months or till the regularly selected candidate assumes office. He was appointed on 28.1.1988 and his appointment was terminated on 19.11.1988. Thus, it was a case where the appointment was continued beyond three months of the initial appointment. Still the Apex Court held that the provisions of Section 25-F of the Act are not applicable.

23. In view of aforesaid discussion it is held that

the respondent was appointed for a fixed period of three months which was subsequently extending and continued for a further period of three months and his appointment came to an end automatically on 30.4.1992. As such the provisions of Section 25-F of the Act are not applicable. The order of reinstatement, in these circumstances, suffers from manifest error of law. The Award, in these circumstances, directing reinstatement of the respondent cannot be sustained.

24. If the order for reinstatement cannot be sustained there remain no occasion for modifying the Award by issuing direction for giving full backwages nor there remains any occasion for direction under Section 17-B of the Act. Consequently it would be futile exercise to go in detail the two cases cited by the learned Counsel for the respondent, namely, Board of School of Education v/s. Presiding Officer, reported in 1996 (5) SLR 476 and Hindustan Tin Work v/s. Its employee, reported in A.I.R. 1979 SC 75. The contention of the learned Counsel for the respondent that the action of the petitioner amounts to illegal and unfair trade practice also cannot be accepted.

25. For the reasons given above Special Civil Application No.10750 of 1998 succeeds and is allowed. The impugned Award dated 15.9.1998 is quashed, as a consequance thereof the Special Civil Application No.11179 of 1998 and Civil Application No.3329 of 1998 fail and are dismissed with no order as to costs. There will be no order as to cost in Special Civil Application No.10750 of 1998.

sd/-

Date : September 02, 1999 (D. C. Srivastava, J.)

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